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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH LEE TOWNER AND
ROGERS LOUIS HICKS,

Petitioners,

vs.

VANDERBILT UNIVERSITY, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

IN A CIVIL RIGHTS SUIT BASED ON 42 U.S.C. 1981, ET SEQ., WHEREIN BLACK PLAINTIFFS CHARGED RACIALLY DISCRIMINATORY ENFORCEMENT OF A HIGHLY UNUSUAL AND EXPERIMENTAL EDUCATIONAL CONTRACT EXISTING BETWEEN A SOUTHERN PRIVATE UNIVERSITY AND ITS STUDENTS, WAS IT ERROR FOR THE COURT OF APPEALS TO IGNORE CONTROLLING AND BASIC PRINCIPLES OF CONTRACT LAW AND CONTRACT CONSTRUCTION IN AFFIRMING THE TRIAL COURT'S DECISION WHICH WAS ERRONEOURSLY RENDERED ON DISPUTED FACTS AND EXCLUDED CONSIDERATIONS OF CONTRACT LAW AND EQUITY.

II.

WHETHER A PRIVATE UNIVERSITY CAN LEGALLY CREATE A DISCIPLINARY SYSTEM BASED ON SOCALLED "AMBIGUOUS DISCIPLINARY RULES" AND POLICIES TO WHICH STUDENTS ARE LEFT TO GUESS WHAT IS PROHIBITED AND WHAT IS NOT; AND THEREAFTER CHARGE, TRY AND CONVICT

EXCLUSIVELY TWO BLACK STUDENTS ON THE BASIS OF AN ALLEGED BREACH OF THESE "AMBIGUOUS RULES" BEFORE A "HONOR COUNCIL TRIAL SYSTEM" WHICH WAS UNFAIRLY CONSTITUTED AND CAPRICIOUSLY ADMINISTERED.

III.

WHETHER A PRIVATE GRADUATE SCHOOL IS EXEMPT FROM THE OTHERWISE LEGAL OBLIGATION OF AFFORDING ITS STUDENTS WHO ARE CHARGED AND COMMITTED TO A SCHOOLHOUSE TRIAL FOR ALLEGED VIOLATIONS OF "SCHOOL RULES" THE RIGHTS OF FUNDAMENTAL FAIRNESS INHERENT AND IMPLICIT IN THE RIGHT TO CONFRONT AND CROSS EXAMINE THE ACCUSER, THE RIGHT NOT TO BE SUBJECT TO PREJUDICIAL HONOR COUNCIL JURORS, AND THE RIGHT TO COUNSEL, SIMPLY BECAUSE IT IS A PRIVATE UNIVERSITY, AS DISTINGUISHED FROM A STATE UNIVERSITY. THE COURT OF APPEALS, IN AFFIRMING THE TRIAL COURT, DECIDED THAT PRIVATE UNIVERSITIES ARE EXEMPT FROM THE OTHERWISE BASIC LEGAL OBLIGATIONS OF

FAIRNESS. PETITIONERS HEREIN DISAGREE. IF PRIVATE UNIVERSITIES ARE NOT EXEMPT FROM AFFORDING BASIC RIGHTS OF PROCEDURAL FAIRNESS TO STUDENTS CHARGED AND COMMITTED TO A "SCHOOLHOUSE TRIAL" FOR ALLEGED SCHOOLHOUSE RULES INFRACTIONS, DOES A 42 U.S.C. 1981 VIOLATION EXIST UNDER CIRCUMSTANCES WHERE WHITE STUDENTS ARE PROVIDED IMMUNITY FROM CONVICTIONS DUE TO THE MANNER IN WHICH THE EXPERIMENTAL SCHOOL IS STRUCTURED AND RUN WHILE MINIORITY STUDENTS ARE CAPRICIOUSLY CHARGED AND CONVICTED OF "INVISIBLE" RULES IN AN EXPERIMENTAL "SCHOOL OF AMBIGUITY."

IV.

WHETHER A PRIVATE UNIVERSITY CAN INTERFERE WITH BLACK STUDENTS' FINANCIAL AID OPPORTUNITY AND REFUSE TO INFORM OR PREVENT THEM FROM APPLYING FOR AVAILABLE FINANCIAL AID MONIES UNDER THE SCHOOL'S ADMINISTERED FEDERAL NATIONAL DEFENSE LOAN PRO-

GRAM AND THE VANDERBILT FEDERAL STUDENT LOAN PROGRAM.

V.

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT DECISION SUSTAINING THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS FIRST AMERICAN NATIONAL BANK, DEFENDANT HEARD, SURFACE AND DEFENDANT BOARD MEMBERS.

VI.

WHETHER THE APPEALS COURT ERRED IN AFFIRMING THE TRIAL COURT'S DECISION NOT TO ALLOW PLAINTIFF TO AMEND COMPLAINT TO ALLEGE COMMON LAW BREACH OF CONTRACT AND DIVERSITY OF CITIZENSHIP.

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IN THE

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OCTOBER TERM 1983

NO. _____

JOSEPH LEE TOWNER AND ROGERS LOUIS HICKS,
PETITIONERS,

VS.

VANDERBILT UNIVERRSITY, et al,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Joseph L. Towner, Sr., and Rogers L. Hicks, pray that a Writ of Certiorari issue to review the Opinion and Judgement of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on November 24, 1982. (Appendix 20a).

OPINIONS BELOW

The unreported opinion of the U. S. District Court may be found in the Appendix to this Petition (24a) page

The opinion of the U. S. Sixth Circuit Court of Appeals is unreported, and appears at page 20a

The U.S.Sixth Circuit Court of Appeals' Order denying petitioners' Motion To Reconsider, etc., was not reported, and appears at page 4a.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on November 24, 1982. (Appendix page 20a , infra). A Motion to Reconsider was submitted to the Court of Appeals on December 13, 1982, but was denied on January 28, 1983. (Appendix page 5a , infra). An Order granting the Petitioners an Extension of Time to file their Petition for a Writ of Certiorari was granted by the United

States Supreme Court on May 4, 1983; said extension is to expire on May 31, 1983 and is found in the Appendix at page 1a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States[1] and Title VI Civil Rights Act of 1968, 42 U.S.C. 1981, 42 U.S.C. 1982, and 42 U.S.C. 1985 are involved in this case. These constitutional and statutory provisions are set out in the appendix hereto page 45a.

STATEMENT OF THE CASE

A civil complaint on behalf of Petitioners, Joseph Lee Towner and Rogers Louis Hicks, was filed in the United States Dis-District Court for the Middle District of Tennessee on or about November 1973 alleging racial discrimination and discrimina-

[1]These constitutional amendments are cited to the court for reference purposes only, inasmuch as constitutional provisions do not apply to private affairs.

tory enforcement of an educational contract. The final defendants, who are the subject of this appeal as respondents, are: Vanderbilt University, Roberts Hayes, James Ullrich, James Davis - all of the foregoing named individuals being faculty members of Vanderbilt University Graduate School of Management; Alexander Heard and James Surface, being Executive Officers of the said defendant University; all individuals named as members of the Board of Trustees of said Vanderbilt University, hereinafter referred to collectively as defendant Board of Trustees; First American National Bank. (J.A. 1491) The jurisdiction of the District Court was invoked pursuant to 42 U.S.C. 1981, et seq. Petitioner Towner was then a citizen of Tallulah, Louisiana and Petitioner Hicks was then a citizen of Detroit, Michigan. Both Towner and Hicks have secured the status of forma paupis at the District Court and Appellant Court

levels.

Petitioners Towner and Hicks were two students who were admitted to Vanderbilt University, Nashville, Tennessee, one of the Respondents herein, in its newly design experimental graudate business program in the fall of 1971, known as the Graduate School of Management hereinafter referred to as GSM. Towner and Hicks were scheduled to graduate in May, 1973 and were the only two blacks in their graduating class composed of approximately 50 students. The respondent, Vanderbilt University, is a privately endowed, predominantly white educational institution. Respondents Vanderbilt University received substantial federal government funds, participated in numerous federal programs and enjoyed federal tax exemption.

The GSM was started in 1969, with a pilot group of approximately 15 students, two years prior to the admission of the

Petitioners herein. The Vanderbilt Graduate School of Management offered a two-year curriculum toward a Master's Degree in Management. (Davis Depo., page 8; J.A.[1] page 1305) In the last semester of the two-year period, Petitioner Towner was charged by two white faculty members in the GSM with acts that the said faculty members characterized as "cheating" or "possibly cheating" on successive occasions, almost on a monthly basis starting around January ~~1983~~ 1973 to May ~~1983~~ 1973. Said charges resulted in Petitioner Towner being "tried" before a group known as a "honor council," composed of students and faculty members of GSM, on or about six separate occasions during the five months period. Some of the aforesaid six trials were "re-trials" of the said charges. More than one charge was heard by the same members jurors of the "honor council."

Petitioner, Rogers Hicks, the only other

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[1]J.A. means reference to Joint Appendix in the Sixth Circuit U.S. Court of Appeals.

black in Towner's class, came to Towner's aid by protesting the charges, the convictions, and subsequent GSM expulsion of Towner to faculty and administrators in the larger university community, including the Defendant Chancellor and Defendant Vice Chancellor of the entire university. Shortly thereafter Hicks was charged with a honor code violation for giving assistance to Towner in a short two-week experimental computer course. The defendant school conceded at trial, however, that, pursuant to the experimental scheme of its program, students were encouraged to collaborate with one another in the computer course.

Neither Petitioner Towner or Petitioner Hicks was permitted to cross examine (nor even allowed to observe) the accusers at the honor council hearings; nor were they allowed the assistance of legal counsel under these very peculiar circumstances. Further,

Towner was subjected to double jeopardy (i.e. two retrials after being initially tried unsuccessfully); both retrials were conducted by prejudicial jurors. Some of the same honor council jurors had tried and convicted Petitioners at more than one trial.

At trial in the United States District Court, both faculty and students testifed that GSM was a highly experimental innovation in educational technique and philosophy, unlike any other graduate business school in the nation. (Davis Depo. 60-77; Tr. 358, 365; J.A. 1338-1355; 371, 378) The proof showed that within this experimental process, the GSM educational program that existed at the time Petitioners were students was beset by confusion, turmoil among faculty, vagueness in educational purpose, and ambiguity in policy and practices.

"Group collaboration" and "group power" were mechanisms designed by the school as

an "educational" and "real world" tool of survival. Accordingly, "group collaboration" and "group learning" was an indispensable adjunct to the GSM "learning philosophy." (Tr. 372-4; Davis Depo. 67; Tr. 1690; Tr. 458-9; Tr. 478-9) In order to achieve their objectives - whether in school or in the "real world" - students were taught that they should cooperate and learn in "groups." (Tr. 372-4; Tr. 479-8; See Exhibit 41) The proof showed through testimony - by both faculty and students - that in fact GSM was deliberately designed by the Administration and faculty to be ambiguous and vague in its policies, (Davis Depo. 60,66) thereby accounting for the absence of defined "rules." (Tr. 358, 383; Tr. 479-80; Tr. 458-61) In addition to the ambiguity of the school, the GSM constitution, upon which the Honor Council relied, was likewise deemed to be "ambiguous."

In addition to the foregoing, the Petitioners herein complained to the Court of Appeals that the Trial Court erred by sustaining a Motion for Summary Judgment filed by Defendant University Administrator, Board Members, and Defendant First American National Bank of Nashville, Tennessee. The Court of Appeals erroneously sustained the Trial Court's summary action. The original complaint filed by the plaintiffs, Petitioners herein, alleged that the plaintiffs had complained to the University Administrators of their discriminatory treatment after their appeal to the Dean of GSM went unheeded. The University Administrator and University Board Members failed to take corrective actions in the matters. Even through the foregoing matters clearly embraced questions of fact, the Trial Court treated the issue as a question of law and sustained the motion of the defendants.

In respect to the defendant-respondent First American National Bank, the plaintiffs alleged in their complaint, and subsequently proved at trial, that they sought to secure student loans from a loan program co-sponsored by Respondent Vanderbilt GSM and Respondent First American Bank on repeated occasions during their two year stay at the graudate school. On each attempt, they were told by the Dean of Financial Affairs at GSM that he had been instructed by the bank not to loan any more black students First American Student loan money due to the fact that a black graduate student had defaulted on this program in 1970. The trial record reflects that at a meeting between local NAACP officials and Faculty of GSM, the Dean, Defendant James Davis, again made the acknowledgement that the bank's instructions was the basis of his refusal to loan money to black students from the GSM -

First American Loan Fund. (Tr. 525; Tr. 1547; Davis Tr. 89, 90) The Trial Court entered a Motion for Summary Judgment on behalf of the bank, after the Defendant bank filed an affidavit denying such instructions and after Defendant Davis denied having received such instructions. The trial record reveals that from 1970 until 1978 - the time trial was in progress - the defendants had no record of ever lending a black student money from this fund since the alleged default of the black student who was enrolled in 1970.

The Plaintiffs- Petitioners established at trial that even though they were extended loans during their tenure at Vanderbilt totaling approximately $10,000.00 a piece for the two years, these amounts were significantly less than amounts given to white students similarly situated (Tr. 4-38, 4-39, 303, 204; 1512, 1513; Davis Tr. 118-122; Exhibit 89; J.A. 254, 255, 343, 344, 645,

646; 1425-1429; 1191) and, moreover, significantly less than what was needed to properly function in this expensive graduate school program. The Petitioners further established that they were neither informed nor allowed to make application to borrow from the School's federal student loan programs, to wit, the National Direct Student Loan Program and the Federal National Defense Student Loan Program. (Davis Depo. 19, 23, 24, 20; David Smith Depo. 15, 22, 23; J.A. 1313, 1315, 1316, 1314; 1439, 1441)

The District Court ruled in favor of the Respondent in its Memorandum Decision and Judgment dated August 10, 1978.

The decision was appealed to the United States Court of Appeals for the Sixth Circuit for review, which affirmed the District Court on November 24, 1982. The Petitioners filed a Motion for Reconsideration and an Order Denying the Motion was entered on

January 28, 1983.

REASONS FOR GRANTING THE WRIT

Settlement of these questions by this Court is plainly in the public interest, since they are likely to be present in almost every private university, honor council proceedings, including many now pending. Many other persons will be affected by these questions presented. Presently, private universities on the graduate level if they wish, may use unfairly their honor council proceedings as a discriminatory weapon against blacks and other minority students to assassinate their character and/or to deny them their right to property, i.e. a Degree. Clearly, the questions presented herein are of significant importance in administrations of justice in academic affairs, as well as the protection of Blacks and other minorities from capricious and arbitrary racial discrimination on the part

of the private university and/or agents.

Too long have Universities taken refuge behind the "Private School veil." In effect, the private university exempts itself from charges of racial discrimination against their black minority students by simply reciting the "private nature" of the contractual relationship.

In the Petitioners' Motion for Re-Consideration it was alleged that the Appeal Court ignored the idea of contract law in dealing with the legal questions necessary to correctly dispose of this lawsuit. This case, like all other contract cases, must be approached with the idea that contract law must play some part in its resolution, particularly, when the Petitioners claimed discriminatory "enforcement." The Appeal Court assumed that the case was substantially controlled by the "clear erroneous rule of appellate review." The Appeals

Court failed, however, to attach importance to contract law, in a contract case. It is respectfully submitted that the important legal step that the Trial Court failed to take in approaching this lawsuit was likewise not taken by the Distinguished Panel of the Sixth Circuit Court of Appeals. That step, simply stated, was to first construed the contract before embarking upon review of the facts. Construction of the contract which is a judicial function, would provide necessary insights into the meaning of the facts. (See Union Planters Corporation, et al vs. Joseph P. Howell, 578 S.W. 2d 87 (Tenn. Court of Appeals, 1978); Tennessee Enamel Mfg. and Company vs. Stovers, Inc., 192 F 2d 836 (6th Cir. 1952)

At oral argument, Petitioners' attorney pointed out to the Court of Appeals that the resolution of the case must begin, as a matter of law, by looking at the nature of

the contract.

Assessment of the nature of the contract will then lead the Court into the second important legal inquiry, to wit, whether there was different enforcement of the contract as to the Petitioners in comparison to white students. The latter inquiry brings the Court within the broad parameters of 42 U.S.C. 1981 et seq., which procribes discriminatory enforcement of contracts on the basis of race. Parenthetically, it can not be overlooked that there is no dispute between the parties that plaintiffs contract was enforced differently by the defendants from the manner of enforcement of white students' contracts. Respondents concede this proposition.

The Respondents simply adopt the legal position (as opposed to a factual position) that such different enforcement was justified under the circumstances, e.g. by bringing charges against the plaintiffs in the

first place and/or utilizing the schoolhouse procedures the school utlized in its unfair trial process, and/or convicting the Petitioners of alleged misconduct and/or denying the Petitioners the opportunity to seek First American Bank loan. Hence, it is self evident that "different enforcement" of the contract was employed. The Dean of the School called the school "a school of ambiguities" and "an experimental school," beset by many conflicts. What was the nature of the ambiguity? When the defendants admit that their contract was unlike any other contract in the Country; the legal instinct demands that one construe the contract - which is a legal task and not a matter of evaluating the "weight of disputed facts." When one examines the contract before the Court, one discovers some more startling and very revealing insights. Those insights brings one unerringly to racial discrimination as practiced by the Respondents herein.

Ambiguity of Rules and Policy. The repeated charges brought against the Petitioners by Respondents Vanderbilt were absolute nullities and void on their face. Said charges constituted harrassment as a matter of law, under circumstances where the school and the rules contained therein were "designed to be ambiguous and vague" and where faculty members based their charges on "unannounced rules." In case at bar, the Respondent Ullrich brought charges on unclear instructions to Towner, and Respondent Hayes brought charges on a "rule" which had never been announced or where there was in fact no infraction at all.

In the United States Supreme Court case of Ashton vs. Kentucky, 385 U.S. 195 at 200, 86 S. CT. 1407, at 1410, 16 L. Ed. 2d 469 (1966), the Supreme Court stated as follows:

> "Vague laws in any area suffer a constitution infirmity; and what the constitution demands of other laws it exacts imperatively of those who under-

> take to punish..." See also Kirkwood vs. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1967) decided by a three judge panel, which included Sixth Circuit Judge Honorable Harry Phillips, and District Court Judge Honorable Bailey Brown".

Moreover, even if the learned Trial Court had sought to analyze this matter under basic contract law, enforcement of vague contractual provisions would be impermissible under the circumstances of this case. Lane vs. Grand Fraternity, 132 Tenn. 235, 177 S.W. 941; Morgan vs. Firestone Tire and Rubber Company, 68 Idaho 506, 201 P. 2d 976; 17 Am Jur 2d, Sections 275 and 276.

The school knew, even before these black students were sent through the "Vanderbilt process," that the "basic principle" of this newly developed experimental school called GSM was that all "academic code of conduct" was or would be ambiguous, ever shifting and ever changing. Respondent James Davis, Dean of GSM, described the in-

situtation as "the school of ambiguity." All witnesses who had a direct connection with GSM openly admitted that GSM was an experimental school, whereby the students were the subject and the object of that experiment.

Witness Dan Lane detailed for the Court how the school operated, its philosophy and its practices of this unique experiment.

There does not presently exist legal precedent as to how "Private Schools," particularly on the graduate school level, must procedurally conduct their affairs when subjecting their students to "schoolhouse trials" for alleged school infractions.

Whatever procedures that are adopted by private graduate schools must conform to principles of "basic fairness," as "basic fairness" has been defined by Anglo-American law for centuries, e.g., effective notice, confrontation of ones accuser, impartial fact finders, equal protection, and clarity of rules. Basic ingredients to that con-

cept known as "fairness." Indeed, concepts molded, through mankind's advancing notions of "ordered justice," to guard against any form of discrimination, including racial discrimination, when the "adversary fact finding process' is being utilized as a tool to determine truth.

The Respondent-Vanderbilt processed two black students through a "judicial proceeding" that was absent - and we might add "absent" by design - of what lawyers, writers of treatises, and Judges normally called "basic due process rights." Rights like confronting one's "accuser" and "cross-examining one's accuser." Vanderbilt would not allow an accused graduate student even the opportunity to see the accuser while testifying, not to mention would not allow cross-examination of the accuser. Other rights that were seriously impaired in the "Vanderbilt trials" were the right to an

"impartial jury" - (in the Vanderbilt trials the "jury" was known as the "honor council")- and the right to be regulated by and tried on "clear and unambiguous rules." The proof showed by an overwhelming weight of evidence- including admissions by the defendants themselves - that this latter right of rule clarity was not only impaired, but deliberately destroyed in most instances by virtue of an "experiment" of which the school was employing upon the students.) Of significant note, the defendants-appellees totally ignored the foregoing decisive issues in their brief.

When black students were processed through the foregoing "judicial process" they would get convicted, repeatedly, on whatever charge that was being brought. On those rare occasions when white students would be confronted with the "vanderbilt process" to be distinguished from "due process" - they would never get convicted, or even

charged.

In respect to the racially discriminating lending practices of GSM and/or First American National Bank, Petitioners Towner and Hicks were discriminatory restricted to a single fund during the two years of their stay at GSM; white students on the other hand, were not so restricted and were allowed to work in business or governmental agencies, both in Nashville, as well as out of the State, or Country, for pay and academic credit while a student at GSM. (Tr. 4-38, 4-39, 203, 204, 1512, 1513; Davis Tr. 118-122; Exhibit 89; J.A. 254, 255, 343, 344, 645, 646; 1425-1429; 1191). Even though Towner and Hicks were frequently in need of funds during their two years, defendant Davis never offered, referred or even mentioned to Towner or Hicks the availability of the National Student Defense Loan or Vanderbilt University Federal Student Loan Fund administered by Vanderbilt

University in the central office of the major University complex, although white students were referred and did receive these government funds through Davis. (Davis Depo. 19, 23, 24, 20; David Smith Depo. 15, 22, 23; J.A. 1313, 1314, 1315, 1316; 1439, 1440, 1441). As aforesaid, Davis restricted the Petitioners' borrowing to the Baker-McGill Fund exclusively, which he administered. Further trial testimony revealed that Respondent Davis blocked Towner from receiving additional financial supplement through employment, as well as academic credit, by preventing him from working at a prestigious national accounting firm that had actively sought his services.

The Appeal Court should not have affirmed the Trial Court's decision. To sustain a Motion for Summary Judgment before trial was totally premature. There was a genuine issue of fact to be tried and hence, Respondent Bank was not entitled to a Summary

Judgment as a matter of law. In sustaining the Respondent First American National Bank's Motion for Summary Judgment, the Trial Court erroneously engaged in resolving factual disputes in favor of the moving party, by indicating that the Trial Court believed Davis' affidavit that the Respondent Bank did not give Davis instructions to deny black students loan after the alleged default of said loan by a black student the year prior to the Petitioners' admission to GSM. The circumstantial evidence subsequently adduced at trial suggest that "believing" Davis on this point was premature. (Davis Tr. 92, 98, 99; Davis Depo. 10, 87, 88, 92; J.A. 1407, 1411, 1412; 1307, 1358, 1359, 1361)

Additionally, the Trial Court, and subsequently, the Court of Appeals, improperly resolved questions of vicarious liability in favor of the defendant bank by (1) ignoring the vicarious liability inherent in

a joint-venture relationship existing between Vanderbilt and First American National Bank; (2) ignoring the vicarious liability in an agency relationship existing between the said institutions; (3) by resolving the factual issue of agency in favor of the defendant bank without an evidentiary hearing; (4) by failing to legally acknowledge that whether in an agency relationship or an independent contractor relationship, under appropriate circumstances, vicarious liability can still attach; (5) by failing to legally acknowledge that Rule 56 of the Federal Rules of Civil Procedure would not allow a Motion for Summary Judgment under the circumstances of this case; (6) by failing to legally acknowledge that intentionally unsupervised conduct by one holding a duty to another allows vicarious liability inasmuch as the duty to obey the law is nondelegable. (Compare, Rural Education Association vs. Bush 298 S.W. 2d 761 (1957);

Palmer vs. Chamberlain, 191 F. 2d 532, (1951) United States vs Youritan Co., et al., 370 F. Supp. 643 (1973); Marr vs. Rife, 503 F. 2d 735 (1974); 3 Vanderbilt Law Review 1, (1949).

The Trial Court improperly dismissed Respondent Chancellor Heard and Vice Chancellor Surface, as well as Respondent Board of Trustee members, pursuant to their Motion for Summary Judgment, inasmuch as (1) Petitioners' pleadings stated a cause of action against the Respondents by alleging that they were put on notice regarding the discriminatory behavior being perpetrated against the Petitioners, failed to act to correct the matter; (2) said Petitioners admitted that Towner and Hicks got in touch with them in respect to these matters in their Answers; (3) the respondents failed to file affidavits in support of their Motion for Summary Judgment; (4) the Trial Court relied on legal authority which was totally inapplicable in

dismissing said Respondents. (Trial Court Memorandum Decision May 1977; J.A. 240) Compare Azar vs. Conley (CA 6 1972) 456 F. 2d 1382; Griffin vs Breckenindge, 403 U.S. 81, 29 L Ed. 2d 338.

As indicated in the case of Lowenthal, et al., vs. Vanderbilt University Graduate School of Management, et al., Memorandum Decision, Chancery Court for Davidson County, Tennessee, unreported, the Chancellor in this cause indicated that a fundamental problem with GSM was the failure of the executive officials, Respondents Heard and Surface, to intervene when students brought complaints to their attention. (See Lowenthal Decision at pages 34-37).

Finally, the Court was in error in refusing to allow Respondents the right to amend their complaint, to allege common law breach of contract and diversity of citizenship, while a Motion for Summary Judgment was pending. (See 6 Moore's Federal Prac-

tice, Sec. 56.10, page 56-170-172; Rossiter vs. Vogel, 134 F 2d 908, at 912; Sherman vs. Hallbauer, 455 F 2d 1236 (CA 5 1972); Green vs. Walsh, 21 F.R.D. 15 (D.C. Wis. 1957); 3 Moore's Federal Practice, Sec 15.15 (3), page 1025, 1026).

In conclusion, the petitioners would remind the Court of the words of the Chief Justice of the United States Supreme Court in the case of Bob Jones University vs. Internal Revenue Service dated May, 1983, when Chief Justice Burger stated as follows: "Whatever may be the rational for such private schools' policies and however sincere the rationale may be, racial discrimination in education is contrary to public policy." "The government has a fundamental, overriding interest in eradication racial discrimination in education-discrimination that prevailed with official approval for the first 165 years of this nation's history."

CONCLUSION

For the foregoing reasons, Petitioners pray that the Court would reverse the judgment of the Court of Appeals entered on or about November 24, 1982, in this cause, enter a judgment on behalf of the Petitioners or in the alternative to remand the cause to the U.S. Court of Appeals for the Sixth Circuit for further proceedings, consistent with the principles of law and theories of fact contained herein.

Respectfully submitted,

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